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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JONATHAN GABRIEL GONZALEZ, Defendant and Appellant.	B146452 (Los Angeles County Super. Ct. No. KA049327)

APPEAL from a judgment of the Superior Court of Los Angeles County, Thomas C. Falls, Judge. Modified and affirmed with directions.

Rita L. Swenor, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Robert F. Katz, Supervising Deputy Attorney General, and Michael R. Johnsen, Deputy Attorney General, for Plaintiff and Respondent.

Jonathan Gabriel Gonzalez appeals from the judgment entered following a jury trial that resulted in his conviction of carrying a concealed firearm and vandalism causing damage of less than $400, with findings defendant was an active participant in a criminal street gang and that he committed the offenses for the benefit of and to promote a criminal street gang. (Pen. Code, §§ 12025, subd. (b)(3), 594, subd. (a) & 186.22, subd. (b)(1).)[1] The court sentenced defendant to prison for a term of seven years on the concealed firearm offense and a concurrent term of seven years on the vandalism offense. We vacate the four-year concurrent term for the gang enhancement to defendant's vandalism conviction and direct the trial court to prepare an amended abstract of judgment. We affirm the judgment as modified.

BACKGROUND

At around midnight on July 27, 2000, defendant and a Hispanic male were at the corner of Altario Street and La Seda Road spray-painting the sidewalk. Two Los Angeles County Sheriff's deputies drove by and shone a light on the men. Defendant and his cohort ran away in the same direction, followed by the deputies in their patrol vehicle.

The deputies lost sight of the men briefly, during which time they heard a gunshot. Defendant's cohort was still running, but defendant stopped and raised his hands over his head. A metal object struck the concrete. Upon his arrest, defendant was found with a can of black spray paint in his pocket. The deputies also found a loaded .38 revolver seven feet from where defendant had stopped. The gun's cylinder contained five live rounds and one expended shell. The gun was warm and smelled of burnt gunpowder. A gunshot residue test later conducted on defendant indicated that defendant had either fired a gun or was in close proximity to a gun when it discharged. The revolver and bullets were tested for fingerprints, but none were found.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

The terms "'HST'" and "'Hurley'" were written in fresh black paint on the sidewalk where the deputies first saw defendant and his cohort. The cost of removing the graffiti from the sidewalk was estimated to be $227.39.

Defendant was a member of the Hurley Street gang, or HST, a clique of the Puente Street gang. The East Side Dukes are a rival gang of Hurley Street. The area where defendant was spray-painting was considered to be a common boundary of Hurley Street and East Side Dukes. Gangs used graffiti to identify gang territory and defacing a rival gang's graffiti is considered to be a challenge to the rival gang. Gang members arm themselves with guns for protection.

The parties stipulated that defendant was an active member of the Hurley Street gang, "within the meaning of Penal Code section 186.22[, subdivision (a)]."

ISSUES

This appeal involves various issues stemming from the amendments to the Penal Code by the initiative measure Proposition 21 in the March 7, 2000 Primary Election (Proposition 21). Proposition 21 is known as the Gang Violence and Juvenile Crime Prevention Act of 1998.

Defendant contends that the trial court erred in imposing a seven-year concurrent term for count 3, the vandalism conviction, pursuant to section 186.22, subdivision (d) (subdivision (d)). He does not attack the seven-year term imposed on count 2, carrying a concealed firearm.

Defendant also attacks the registration requirement of section 186.30 on various constitutional grounds.[2]

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[2] On March 4, 2002, defendant filed a notice to withdraw his contention that Proposition 21 violates the single-subject rule.

DISCUSSION

1. Penal Code section 186.22, subdivision (d)

Section 186.22, subdivision (b) (subdivision (b)) applies to any person convicted of a *felony* committed for the benefit of a criminal street gang with the specific intent of furthering that gang's criminal conduct. Subdivision (b), as amended by Proposition 21, lists sentence enhancements and alternate sentencing schemes, depending on the nature of the underlying felony offense.

Subdivision (d), as added by Proposition 21, provides in pertinent part: "Any person who is convicted of a public offense punishable as a felony or a misdemeanor, which is committed for the benefit of" a criminal street gang with the specific intention of furthering that gang's criminal conduct "shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison for one, two, or three years[.]"

The crime of vandalism causing damage in an amount over $400 is a "wobbler." (§ 594, subd. (b)(1).) A "wobbler" is a crime punishable in the trial court's discretion as either a felony or a misdemeanor. (*People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 974; see § 17, subd. (b).)

The crime of vandalism causing damages in an amount *less* than $400 is punishable for a term of not more than one year in a county jail and a fine of $1,000. (§ 594, subd. (b)(2).) Because it is a crime not "punishable with death or by imprisonment in the state prison" and not classified as an infraction, it is a *misdemeanor*. (§ 17, subd. (a).)

Defendant was alleged to have carried a concealed firearm, a felony (count 2) and to have committed vandalism of over $400 (count 3). As alleged, count 3 described a wobbler. (§ 594, subd. (b)(1); *People v. Superior Court* (*Alvarez*), *supra*, 14 Cal.4th at p. 974.) The amended complaint also alleged that "pursuant to Penal Code section 186.22(b)(1) as to count(s) 2 and 3 that the above offense [*sic*] was [*sic*] committed for the benefit of, at the direction of, and in association with a criminal street

gang with the specific intent to promote, further and assist in criminal conduct by gang members."

After the People rested their case, defense counsel moved for an acquittal of the vandalism charge, arguing that there was insufficient evidence that the damage was over $400. The prosecutor objected, arguing that the damage amount attributed to graffiti on a nearby wall would bring the total damage amount to over $400. The prosecutor alternately argued that because subdivision (d) elevated a misdemeanor to a felony, the amount of damage caused by the vandalism was immaterial.

Defense counsel argued that under subdivision (d) the maximum punishment that could be imposed for a misdemeanor was a year in jail with a minimum of 180 days. The court addressed another matter and then returned to the applicability of subdivision (d). Defense counsel altered his position and argued that subdivision (d) applied only to wobbler offenses.

The court disagreed, stating that the minimum prison term listed in subdivision (d), one year, was less than the lowest listed prison term for a felony, 16 months; thus, it would be unreasonable to limit subdivision (d) to only wobbler offenses. The court stated that if the jury returned a guilty verdict on the vandalism charge and a finding that defendant committed the crime for the benefit of a criminal street gang with the specific intent to promote criminal activity, then the court would deem it a felony no matter what dollar damage amount the jury found.

The jury found defendant guilty of carrying a concealed firearm and found true the subdivision (b) gang enhancement, namely, that defendant committed a felony and that the felony was committed for the benefit of a criminal street gang and with the specific intent of furthering that gang's criminal conduct. The jury also found defendant guilty of vandalism, with the total amount of damages caused to be $227.39, and found true the subdivision (b) gang enhancement.

At sentencing, defense counsel argued that subdivision (d) did not apply to the vandalism offense because he was found guilty of a misdemeanor, not a wobbler. The court rejected counsel's argument, citing the same reasons it had earlier stated.

On count 2, the offense of possession of a concealed firearm, the court imposed the three-year upper term, plus the four-year upper term for the subdivision (b) gang enhancement, for a total term of seven years. On count 3, the vandalism offense, the court found that subdivision (d) elevated the vandalism offense to a felony and imposed the three-year upper term pursuant to subdivision (d). The court further found that because the vandalism offense was elevated to a felony, the subdivision (b) gang enhancement applied. The court then imposed the four-year upper term for the subdivision (b) gang enhancement on the three-year term imposed on count 3, for a total term of seven years, and ordered count 3 to be served concurrently with the seven-year term imposed in count 2.

On appeal, defendant argues that the court erred in imposing, pursuant to subdivision (d), a seven-year concurrent term on count 3, the vandalism offense. He asserts that subdivision (d) applies only to wobblers and contends that because he was found guilty of an offense that could be punished only as a misdemeanor, the court erred in using subdivision (d) to impose punishment for count 3.[3] He further asserts that the trial court was prohibited from imposing a four-year enhancement term pursuant to subdivision (b).

We disagree with defendant that the court erred in imposing a sentence pursuant to subdivision (d). The issue was decided contrary to defendant's position in a recently published case by our colleagues in Division Two. (*People v. Arroyas* (Mar. 22, 2002, B147995) ___ Cal.App.4th ___ [2002 D.A.R. 3204] (*Arroyas*).) "[V]andalism is a *public offense* under sections 15 and 16, regardless of whether it is charged as a felony or misdemeanor and regardless of the punishment provided." (*Id.* at p. ___ [2002 D.A.R. at

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[3] Whether subdivision (d) may be applied to misdemeanor offenses or whether its application is limited to wobbler offenses is presently before the California Supreme Court in *Robert L. v. Superior Court* (2001) 90 Cal.App.4th 1414, review granted October 24, 2001, S100359.

p. 3205], italics added.) Subdivision (d) applies to a "*public offense* punishable as a felony or a misdemeanor" committed for the benefit of a criminal street gang and with the specific intent of promoting that gang's criminal activity. (Italics added.) Therefore, subdivision (d) applies when a person (1) is found guilty of vandalism "regardless of the amount of damage" (*Arroyas*, *supra*, ___ Cal.App.4th at p. ___ [2002 D.A.R. at p. 3205]) and (2) is found to have committed the vandalism for the benefit of a criminal street gang and with the specific intent of promoting that gang's criminal activity. Both determinations were made here. Accordingly, it was within the court's discretion to impose a prison term sentence of one, two, or three years. (*Ibid*.)

But defendant's contention that the court erred in imposing a four-year gang enhancement pursuant to subdivision (b) has merit. As explained in a thorough and well-reasoned discussion in *Arroyas*, there is no support in either the language of section 186.22 or its legislative history for the proposition that a misdemeanor, converted to a felony pursuant to subdivision (d), may be subject to further enhancement pursuant to subdivision (b). (*Arroyas*, *supra*, ___ Cal.App.4th ___ [2002 D.A.R. at pp. 3205–3207].) Accordingly, we vacate the four-year enhancement term to count 3, the vandalism offense.

2. Alleged Due Process violation

Defendant alternately contends that his constitutional due process right to notice was violated because the information did not advise him that he was subject to sentencing pursuant to subdivision (d). We reject this contention.

Defendant failed to object to the pleading defect and therefore has waived the issue. Defendant recognizes this and argues that his trial counsel's failure to object constituted ineffective assistance. We disagree. During the trial, the parties and the court discussed the applicability of subdivision (d) with respect to the vandalism charge. The court ruled that subdivision (d) was applicable regardless of the amount of damage caused, thereby providing defendant with ample notice that he was subject to sentencing under that provision. Thus, defendant was not prejudiced by his counsel's failure to

object to the pleading defect. (See *People v. Sanchez* (1939) 35 Cal.App.2d 316, 317–318.)

3. Constitutional issues[4]

a. Vagueness

Section 186.30 was added by Proposition 21. Section 186.30 provides in pertinent part that a person convicted of a crime as to which the criminal street gang enhancement of section 186.22, subdivision (b) was found true must register as a gang offender within 10 days after the person's release from custody or change of residence.[5]

Section 186.32, subdivision (a)(2)(C), also added by Proposition 21, provides that when the adult offender registers, "[a] written statement, signed by the adult, giving any information that may be required by the law enforcement agency, shall be submitted to the law enforcement agency."

Section 186.33, also added by Proposition 21, provides that a knowing violation of section 186.30 is a misdemeanor and, if the person who knowingly violated section 186.30 is later convicted of or found in a juvenile wardship proceeding to have committed any offense specified in section 186.30, the registration violation is punishable by an enhancement of 16 months, two years, or three years.

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[4] Several of defendant's constitutional challenges are before the Supreme Court in *In re Walter S*. (2001) 89 Cal.App.4th 946, review granted September 19, 2001, S099120.

[5] Section 186.30 provides: "(a) Any person described in subdivision (b) shall register with the chief of police of the city in which he or she resides, or the sheriff of the county if he or she resides in an unincorporated area, within 10 days of release from custody or within 10 days of his or her arrival in any city, county, or city and county to reside there, whichever occurs first. [¶] (b) Subdivision (a) shall apply to any person convicted in a criminal court or who has had a petition sustained in a juvenile court in this state for any of the following offenses: [¶] (1) Subdivision (a) of Section 186.22. [¶] (2) Any crime where the enhancement specified in subdivision (b) of Section 186.22 is found to be true. [¶] (3) Any crime that the court finds is gang related at the time of sentencing or disposition."

Defendant contends that the requirement that the adult offender provide "any" information that may be required by the law enforcement agency is unconstitutionally vague, because it fails to provide adequate notice of the type of information required and permits arbitrary and discriminatory enforcement.

"'Registration requirements generally are based on the assumption that persons convicted of certain offenses are more likely to repeat the crimes and that law enforcement's ability to prevent certain crimes and its ability to apprehend certain types of criminals will be improved if these repeat offenders' whereabouts are known. [Citation.] Accordingly, the Legislature has determined that sex offenders (Pen. Code, § 290), narcotics offenders (Health & Saf. Code, § 11590) and arsonists (Pen. Code, § 457.1) are likely to repeat their offenses and therefore are subject to registration requirements.' [Citation.]" (*In re Luisa Z*. (2000) 78 Cal.App.4th 978, 982 (*Luisa Z.*); accord, *People v. Castellanos* (1999) 21 Cal.4th 785, 796 ["'"[t]he purpose of section 290 is to assure that persons convicted of the crimes enumerated therein shall be readily available for police surveillance at all times because the Legislature deemed them likely to commit similar offenses in the future"'"].)

The registration statutes mentioned in *Luisa Z.* contain language similar to the language appellant challenges as unconstitutionally vague. Section 290, subdivision (e)(2)(A) provides that a sex offender who is required to register under section 290 must make a signed statement "giving information as shall be required by the Department of Justice and giving the name and address of the person's employer, and the address of the person's place of employment if that is different from the employer's main address." Section 290, subdivision (m) provides that if a peace officer reasonably suspects a person may be at risk from a sex offender convicted of certain specified crimes, the officer may disclose to community members who may be at risk the offender's name, known aliases, gender, race, physical description, date of birth, and address, the description and license plate number of the offender's vehicles or vehicles the offender is known to drive, and relevant parole or probation conditions. Health and Safety Code section 11594 states that a person who is required to register as a narcotics

offender must provide a signed written statement "giving such information as may be required by the Department of Justice." Section 457.1, subdivision (f) provides that a person required to register as an arsonist must make a signed written statement "giving the information as may be required by the Department of Justice."

Section 2 of Proposition 21 declares that criminal street gangs "pose a significant threat to public safety" (Ballot Pamp., Primary Elec. (Mar. 7, 2000) text of Prop. 21, § 2, subd. (b), p. 119), asserts that, without adequate intervention, the problem of gang violence will increase (Ballot Pamp., Primary Elec. (Mar. 7, 2000) text of Prop. 21, § 2, subd. (d), p. 119), declares that dramatic changes are needed in the way California treats criminal street gangs if we are to avoid a surge in gang violence (Ballot Pamp., Primary Elec. (Mar. 7, 2000) text of Prop. 21, § 2, subd. (k), p. 119), and states that the purpose of Proposition 21 is to increase public safety (Ballot Pamp., Primary Elec. (Mar. 7, 2000) text of Prop. 21, § 2, subd. (k), p. 119).

We construe the requirement of section 186.32, subdivision (a)(2)(C) that a gang offender required to register under section 186.30 make a signed written statement "giving any information that may be required by the law enforcement agency" (§ 186.32, subds. (a)(1)(C), (a)(2)(C)) as meaning that the gang offender must provide information necessary for the law enforcement agency to locate the offender, such as the person's full name, any aliases, the person's date of birth, the person's residence, the description and license plate number of any vehicle the person owns or drives, and information regarding any employment the person has. So construed, the provision does not permit arbitrary and discriminatory enforcement. (See *Williams v. Garcetti* (1993) 5 Cal.4th 561, 575–577.)

b. Search and seizure

Defendant contends that section 186.32 violates the prohibition against unreasonable search and seizures. He argues that, as written, subdivision (a)(2)(C) of the statute subjects the adult offender to unknown questioning. As we have construed section 186.32, subdivision (a)(2)(C), that provision does not suffer from this defect.

Defendant further asserts that the statute's requirement that the adult offender submit fingerprints and a photograph (§ 186.32, subd. (a)(2)(D)), without a separate factual review by a neutral magistrate to determine necessity, is tantamount to an unlawful detention and search. We disagree.

The purpose of the fingerprint and photograph requirement is not to investigate a particular crime (*People v. King* (2000) 82 Cal.App.4th 1363, 1373) nor does the requirement focus on a particular individual, as opposed to a class of people, namely, all persons as defined by section 186.30, subdivision (b). In all practicality, there are no special facts for a neutral magistrate to evaluate and thus "it is reasonable to dispense with the warrant requirement." (*People v. King*, *supra*, 82 Cal.App.4th at p. 1373.) And considering the minimal intrusion on an adult offender's privacy interest and the government's strong interest in reducing overall gang violence by discouraging recidivist gang-related criminal behavior, the fingerprint and photograph requirements are not unreasonable and therefore do not violate the Fourth Amendment. (See 82 Cal.App.4th at pp. 1373–1378.)

c. Remaining constitutional issues

Defendant contends that, as written, the requirement of section 186.32 that the adult offender provide any information required by the law enforcement agency is overbroad because it violates the First Amendment right to freedom of association, the right of privacy guaranteed by the California Constitution, the privilege against self-incrimination, and the right to counsel. As we have construed section 186.32, that provision does not suffer from any of these defects. (See *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1112 [freedom of association]; *People v. Hove* (1992) 7 Cal.App.4th 1003, 1005–1007 [right of privacy]; *Marchetti v. United States* (1968) 390 U.S. 39, 53 [privilege against self-incrimination].)

DISPOSITION

Defendant's four-year enhancement term on count 3 is vacated. The trial court is directed to prepare a corrected abstract of judgment reflecting such change and forward it to the Department of Corrections. As modified, the judgment is affirmed.

NOT TO BE PUBLISHED.

MALLANO, J.

We concur:

SPENCER, P. J.

VOGEL (MIRIAM A.), J.